No. 80-1244

APR 3
ALEXANDER L.
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1980

VIRGIL ALESSI, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*

JOHN C. KEENEY
*Acting Assistant Attorney General*

CAROLYN L. GAINES
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTIONS PRESENTED

1. Whether a violation of the provisions of Fed. R. Crim. P. 11 dealing with the factual basis for a guilty plea and the defendant's understanding of the charge entitles a defendant to collateral relief when the district court found, after an evidentiary hearing, that the violation did not prejudice the defendant.

2. Whether a defendant who is convicted of two offenses on the basis of guilty pleas entered as part of a plea bargain is automatically entitled to collateral relief from both convictions when one is vacated.

## TABLE OF CONTENTS


Page

Opinions below ..... 1

Jurisdiction ..... 1

Statement ..... 2

Argument ..... 6

Conclusion ..... 10


## TABLE OF AUTHORITIES

Cases:


*Brady* v. *United States*, 397 U.S. 742 ..... 9

*Carreon* v. *United States*, 578 F. 2d 176 ..... 6-7

*Gilbert* v. *United States*, 466 F. 2d 533 ..... 9

*Hill* v. *United States*, 368 U.S. 424 ..... 6, 7

*Horsley* v. *United States*, 583 F. 2d 670 ..... 7

*Keel* v. *United States*, 585 F. 2d 110 ..... 6

*Mack* v. *United States*, 635 F. 2d 20 ..... 7, 8

*McMann* v. *Richardson*, 397 U.S. 759 ..... 9

*Rosas* v. *United States*, 505 F. 2d 115 ..... 9

*United States* v. *Dayton*, 592 F. 2d 253, aff'd on rehearing, 604 F. 2d 931, cert. denied, 445 U.S. 904 ..... 6, 7

*United States* v. *Johnson*, 612 F. 2d 305 ..... 7

*United States* v. *Timmreck*, 441 U.S. 780 ..... 6, 7, 8




PREVIOUS PAGE WAS BLANK

Page

Statutes and rules:

18 U.S.C. 2 ..... 2
21 U.S.C. 812 ..... 2
21 U.S.C. 841(a)(1) ..... 2
21 U.S.C. 841(b)(1)(A) ..... 2
26 U.S.C. 7201 ..... 2
28 U.S.C. 2255 ..... 2
Fed. R. Crim. P. :
Rule 11 ..... 6, 7, 8
Rule 20 ..... 2

# In the Supreme Court of the United States

OCTOBER TERM, 1980

---

No. 80-1244

VIRGIL ALESSI, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B12) is reported at 628 F. 2d 1133. The opinion of the district court (1 A. 89-103)[1] is not reported. An earlier opinion of the court of appeals (Pet. App. A1-A13), remanding the case to the district court, is reported at 593 F. 2d 476. An earlier opinion of the district court (1 A. 75-88) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on August 13, 1980. A petition for rehearing was denied on October 2, 1980. The petition for a writ of certiorari was filed on December 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

---

[1] "A." refers to the appendix filed in the court of appeals.

## STATEMENT

1. Petitioner was indicted in the United States District Court for the Southern District of New York on several counts of violating federal narcotics laws, and in the United States District Court for the Eastern District of New York on several counts of violating federal tax laws (Pet. App. B2). In November 1976, in the United States District Court for the Southern District of New York, petitioner pleaded guilty to one count of each indictment[2] in satisfaction of all charges against him (*ibid.*). The narcotics charge was that petitioner had aided and abetted the distribution and possession with intent to distribute of a quantity of heroin (*id.* at A3) in violation of 21 U.S.C. 812, 841(a)(1), and 841(b)(1)(A), and 18 U.S.C. 2. The bill of particulars explained that petitioner had given the heroin to one Manfredonia, who then distributed it in the Southern District of New York (1 A. 37). The tax charge was that petitioner had violated 26 U.S.C. 7201 by willfully and knowingly attempting to evade income tax (Pet. App. A3). Petitioner was sentenced to 13 years' imprisonment followed by six years' special parole on the narcotics charge, and to a consecutive term of two years' imprisonment on the tax charge (*id.* at B2-B3).

In May 1978, petitioner moved to vacate his sentences under 28 U.S.C. 2255. He claimed that his guilty pleas were invalid because he did not understand the nature of the charges and because there was no factual basis for his pleas (Pet. App. B3; 1 A. 47-53). The district court denied the motions without a hearing (Pet. App. A4; 1 A. 75-88). The court of appeals, however, instructed the district court to vacate the conviction on the tax count and to hold an

---

[2]The indictment rendered in the Eastern District of New York was transferred to the Southern District pursuant to Fed. R. Crim. P. 20 and the agreement of the parties (Pet. App. A3; 1 A. 75-76).

evidentiary hearing on the narcotics conviction (Pet. App. A1-A13; *Alessi* v. *United States*, 593 F. 2d 476 (2d Cir. 1979)). The court of appeals held that the trial judge did not adequately explain the nature of the tax evasion charge to petitioner, that there was little reason to believe petitioner in fact understood the nature of that charge, and that in any event the government had failed to establish a factual basis for the charge (Pet. App. A9-A10). The court also found that the trial judge did not fully explain that the narcotics charge was for aiding and abetting, and it held that the record did not reflect a factual basis for the aiding and abetting aspect of the charge (*id.* at A11-A12). But the court did not order petitioner's narcotics conviction vacated; instead, it remanded for an evidentiary hearing because it found "some reason to believe that a hearing might develop both that [petitioner] had a full understanding of the charge and that there was a factual basis for the plea" (*id.* at A12). In connection with petitioner's understanding of his plea, the court pointed out that petitioner not only "has had extensive experience with narcotics offenses" but had been engaged in lengthy litigation focusing on precisely the aiding and abetting aspect of the narcotics charge to which he pleaded guilty (*ibid.*).[3] In connection with the factual basis for the plea, the court suggested that evidence of petitioner's guilt might appear in the record of the trial of persons who had been indicted with petitioner; the judge who took

---

[3]A previous plea bargain prevented the government from prosecuting petitioner for narcotics offenses committed in the Eastern District of New York during the period in issue here. The transaction between petitioner and Manfredonia occurred in the Eastern District, but when petitioner moved to dismiss his narcotics indictment, the United States Court of Appeals for the Second Circuit held that petitioner could be indicted on the aiding and abetting charge to which he eventually pleaded guilty. This Court denied review. *United States* v. *Alessi*, 544 F. 2d 1139, 1152-1154 (2d Cir.), cert. denied, 429 U.S. 960 (1976). In that litigation, petitioner focused on the precise nature of the aiding and abetting charge. See, *e.g.*, 544 F. 2d at 1152-1153 n.14.

petitioner's plea had presided over that trial (*ibid.*). Consequently, the court remanded for a hearing on the factual basis for the plea and on petitioner's understanding of the charge. The court also directed that the hearing consider petitioner's understanding of his liability for special parole (*id.* at A12-A13).

2. On remand, the district court heard evidence from petitioner and the several attorneys who represented him either in the guilty plea proceedings or in the litigation focusing on the aiding and abetting aspect of the narcotics indictment (2 A.). The court concluded, in a written opinion, that there was a factual basis for petitioner's plea of guilty to the narcotics charge and that petitioner had understood both that charge and his liability for special parole (1 A. 89-103).

To support its finding that there was a factual basis for the plea, the court relied principally on the record of the trial of petitioner's co-defendants, which showed that petitioner's transaction with Manfredonia was part of "a far-flung drug distribution network" and "a large and continuing operation for the distribution of heroin throughout the metropolitan area, including [the Southern District] * * *" (1 A. 101-102). This established the necessary mental elements of the aiding and abetting charge.

The district court's conclusion that petitioner understood the charge was based on the attorneys' testimony (1 A. 96-97)[4] which, the court said, made it clear that the narcotics charge—and particularly its aiding and abetting aspect—had been explained to petitioner (*id.* at 96-98). The only

---

[4]Petitioner is particularly vigorous in his attack on the attorney who represented him at the time of the guilty plea (*e.g.*, Pet. 9-10). The court of appeals described that attorney as "experienced and resourceful" (Pet. App. A3) and "astute" (*id.* at A12), and the district court cited evidence to the same effect (1 A. 96).

contrary evidence, the court said, was petitioner's own testimony (*id.* at 97-98). But the court found that petitioner had admitted that he perjured himself at least three times previously (*id.* at 95), and that "petitioner's testimony is in large part not credible and tailored to support his contentions" (*ibid.*). One attorney represented that he had explained special parole to petitioner in connection with a different narcotics charge (*id.* at 99, 115), and petitioner had said he understood it in connection with that charge (*id.* at 99). Another attorney's testimony made it "inconceivable" that special parole was not explained to petitioner (*id.* at 100). Again, the court explicitly found not credible petitioner's "self-serving" professions that he did not understand special parole (*ibid.*).

3. The court of appeals affirmed (Pet. App. B1-B12). It remarked that "[w]itness credibility * * * played a major role in the district court's findings" and that appellate courts "must be wary of overturning findings based on such determinations of credibility" (*id.* at B4). The court of appeals reviewed the facts on which the district court had relied and held that "the evidence, both testimonial and non-testimonial, fully supports the district court's findings" (*ibid.*).[5]

---

[5]Judge Will concurred but expressed the following view (Pet. App. B7):

> [T]he holding of an evidentiary hearing on a § 2255 motion to determine whether the defendant may have understood the nature and essential elements of the crime to which he pleaded and whether there may have been a factual basis for the plea when the record of the taking of the plea is insufficient to establish either is, I believe, inconsistent with the purposes of Rule 11.

Judge Will believed that the previous panel, in remanding for an evidentiary hearing, had endorsed a different principle (*id.* at B6), which he accepted as the law of the case (*ibid.*).

## ARGUMENT

1. Petitioner contends (Pet. 12-18) that the defects in the proceeding in which he pleaded guilty to the narcotics charge require this Court to vacate his conviction. *United States* v. *Timmreck*, 441 U.S. 780 (1979), held that a defect in a guilty plea proceeding does not warrant collateral relief if it did not prejudice the defendant. *Id.* at 783-785. Here, the district court expressly found, after an evidentiary hearing, that there was a factual basis for petitioner's plea and that petitioner understood both the nature of the charge and the possible penalty. Petitioner does not suggest any other ways in which he might have been prejudiced by the plea-taking proceeding, and none is apparent. The district court's finding is abundantly supported by the record and was upheld by the court of appeals. *Timmreck*, therefore, disposes of petitioner's claim.[6]

The decisions cited by petitioner do not establish a conflict among the circuits on this point. *United States* v. *Dayton*, 604 F. 2d 931 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 904 (1980), dealt with a direct appeal (see *United States* v. *Dayton*, 592 F. 2d 253, 254 (5th Cir. 1979)). Indeed, the Fifth Circuit's decision in *Keel* v. *United States*, 585 F. 2d 110 (1978) (en banc), anticipated *Timmreck*. *Carreon* v. *United States*, 578 F. 2d 176 (7th Cir.

---

[6]Judge Will, concurring below, was correct in his view that Rule 11 can be satisfied only by a proper allocution between the judge and the defendant (Pet. App. B6-B12). In issuing its remand order, the court of appeals found that the allocution in this case was inadequate. But *Timmreck* established that a defendant must be denied collateral relief unless he shows a "constitutional" or "jurisdictional" error, a " 'complete miscarriage of justice,' " or "a proceeding 'inconsistent with the rudimentary demands of fair procedure.' " *Timmreck*, *supra*, 441 U.S. at 784, quoting *Hill* v. *United States*, 368 U.S. 424, 428 (1962). As the remand order of the court of appeals made clear (see Pet. App. A6-A7, A12-A13), the hearing on remand in this case was intended to determine whether the plea-taking proceeding prejudiced petitioner so as to justify collateral relief.

1978), and *Horsley* v. *United States*, 583 F. 2d 670 (3d Cir. 1978), antedated *Timmreck*.[7] The sole arguably conflicting decision is *Mack* v. *United States*, 635 F. 2d 20 (1st Cir. 1980), where the court of appeals directed the grant of collateral relief from a conviction because of the district court's failure, during the Rule 11 proceeding, to inquire adequately into the voluntariness of the plea or into the defendant's understanding of the charges against him. In so doing, the court of appeals stated that *Timmreck* does not foreclose collateral attacks based on Rule 11 violations when the violations involve provisions that are "central to the policy considerations underlying [the] Rule" (635 F. 2d at 24).

This reading of *Timmreck* is mistaken. While the "centrality" analysis may, as the Fifth Circuit held in *Dayton*, *supra*, provide the proper standard for evaluating a Rule 11 challenge raised on direct appeal, collateral relief should never be afforded simply on the basis of a showing of a Rule 11 violation, absent a further showing that the violation prejudiced the defendant in some material respect. " '* * * [C]ollateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule.' " *Timmreck*, *supra*, 441 U.S. at 785, quoting *Hill* v. *United States*, *supra*, 368 U.S. at 429. Thus in *Mack*, even though under the circumstances there unquestionably was an inadequate inquiry by the trial court into voluntariness at the time the plea was accepted, the question on collateral attack should have been whether the plea was in fact

---

[7] In *United States* v. *Johnson*, 612 F. 2d 305 (7th Cir. 1980), which involved a collateral challenge to a state guilty plea but is cited by petitioner as an analogy, the court expressly noted that its review was confined to the record of the state guilty plea proceeding "[b]ecause the only evidence received by the district court on the issue of the validity of the state conviction was the state court record" (*id.* at 307). The court clearly did not foreclose an independent inquiry into the voluntariness of the plea or the defendant's understanding of the charge.

voluntary, not simply whether the court failed properly to inquire. The proper disposition in *Mack*, therefore, would have been a remand to the district court for a hearing into the question whether Mack's plea had been knowing and voluntary.

Although *Mack* is inconsistent with the approach both of the Second Circuit in this case and of this Court in *Timmreck*, we do not believe further review of the instant case is necessary. In the first place, although the defendant in *Mack* was plainly entitled to a remand hearing, the government sought to defend the propriety of the district court's denial of relief without a hearing, and it never suggested to the court of appeals that a remand might be appropriate. Were such a course suggested to the First Circuit in subsequent cases, it is not clear that it would be rejected. In addition, *Mack* was very likely colored by the extraordinary nature of the Rule 11 colloquy, in the course of which the defendant stated, "I am being pressured into making the plea. I am not doing it of my own free will" (*Mack, supra*, 635 F. 2d at 23; emphasis deleted).

In sum, we view *Mack* as likely reflecting an isolated departure from the teachings of *Timmreck*, colored by the unusual facts of the case and the nature of the government's arguments. Unless the First Circuit or some other court of appeals persists in the position reflected in *Mack*, we believe there is no need for review of the issue by this Court, particularly in a case such as the present one that is faithful to the principles of *Timmreck*.

2. Petitioner also contends (Pet. 18-20) that because his conviction on the tax charge was vacated, his narcotics conviction must also be set aside. This contention is without merit. In return for petitioner's pleading guilty to two charges, the government agreed not to prosecute petitioner on the remaining counts in the tax and narcotics indictments. The government has made no move to prosecute

petitioner on either indictment, although only one of petitioner's guilty pleas stands. Thus the government has fully performed its part of the agreement, and petitioner has received a better outcome than he bargained for.[8]

Petitioner's claim that he was subjected to some illegal threat (Pet. 19) is baseless. Petitioner was threatened with prosecution only on charges on which he had been duly indicted. See, *e.g.*, *Brady* v. *United States*, 397 U.S. 742, 751 & n.8 (1970). If petitioner's argument were accepted, the government would be required to demonstrate in a guilty plea proceeding a factual basis for every charge it withdraws in return for the defendant's guilty plea; there is clearly no such requirement. And petitioner cannot attack his guilty plea to the narcotics charge on the ground that he overestimated the likelihood that he would be convicted on one of the other charges. See *McMann* v. *Richardson*, 397 U.S. 759, 769-771 (1970).[9]

---

[8]This record does not present the question whether the government must permit petitioner to withdraw his guilty plea to the narcotics charge if it does prosecute him on any of the other charges in the two indictments.

[9]There is again no conflict among the circuits on this point. The Fifth Circuit has explained that *Gilbert* v. *United States*, 466 F. 2d 533, 534 (5th Cir. 1972) (per curiam), merely "stand[s] for the proposition that a guilty plea cannot be accepted unless the court has made a determination * * * that a factual basis exists for the defendant's acknowledgment of his guilt." *Rosas* v. *United States*, 505 F. 2d 115, 116 (1974). The other cases cited by petitioner (Pet. 19) involved errors that affected all of the charges to which the defendants pleaded guilty.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

JOHN C. KEENEY
*Acting Assistant Attorney General*

CAROLYN L. GAINES
*Attorney*

APRIL 1981

DOJ-1981-04